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Tan See Siong & Anor v Herman Ando

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 08(I)-178 OF 2009(W)
ALAUDDIN PCA, JAMES FOONG AND HELILIAH FCJJ
30 AUGUST 2010

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Civil Procedure — Appeal — Appeal to Federal Court — Leave to appeal, application for — Contempt order based on non-compliance with mandatory injunction that was subsequently set aside by judge who made it — Whether contempt proceedings were based on wrongfully made court order — Whether there were new questions of law or questions of public importance — Whether leave should be granted — Courts of Judicature Act 1964 s 96(a)

D

Civil Procedure — Injunction — Interim injunction — Interim injunction granted to restrain defendant from carrying out further works and carrying out repairs to plaintiff's house — Mandatory injunction subsequently set aside by judge who made it — Whether first order was effective — Whether contempt order based on first was correctly made

E

Civil Procedure — Judge — Variation of order — Whether judge could vary his own judgment

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Herman Ando ('the plaintiff') had instituted a writ action against Tactland Development Sdn Bhd, a housing development company ('the defendant'), for damages caused to his house as a result of the construction and development work carried out by the defendant in the land adjacent to the plaintiff's house. Subsequently the plaintiff applied for and obtained an interim injunction to restrain the defendant from carrying out further development on the adjacent land and requiring the defendant to carry out repairs to the plaintiff's house ('the first order'). The defendant filed an appeal to the Court of Appeal against this order ('the first appeal'). When the defendant failed to comply with the mandatory aspect of the order, ie to repair the plaintiff's house, the latter filed an application to commit the directors of the defendant company ('the applicants') for contempt. Before the application for contempt was heard the defendant filed an application to query ('query application') whether the mandatory aspect of the injunction was indeed granted. The query application was heard by the same judge who clarified that he had granted the stop work order but that he could not have given the mandatory order because there was a dispute as to what caused the damage to the plaintiff's premises ('the variation order'). Dissatisfied with this varied order, the plaintiff filed an appeal to the

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Court of Appeal ('the second appeal'). In the contempt proceedings, both the applicants were found guilty of contempt and ordered to serve three weeks' imprisonment and a fine of RM15,000 each. The applicants filed an appeal against this order ('the third appeal'). Thereafter the plaintiff filed an application to expunge the variation order but this application was dismissed on the grounds that it was made 30 days after the variation order. The plaintiff filed an appeal against that decision ('the fourth appeal'). By consent of the parties, all the four appeals were heard together. The Court of Appeal dismissed the first appeal on the grounds that there was no reason to disturb the findings in the first order as the trial judge had applied the correct principles of law; allowed the second appeal on the grounds that the trial judge had no power to vary a judgment once it had been formally recorded; dismissed the third appeal, which was against the contempt order, on the grounds that the trial judge had correctly concluded that there was contempt by the applicants; and allowed the fourth appeal on the grounds that the plaintiff's complaint had merits. This was the applicants' application for leave to appeal to the Federal Court under s 96(a) of the Courts of Judicature Act 1964. It was the applicants' contention that the first order, upon which the contempt order was based, was wrongfully made and was subsequently varied and that therefore the applicants were not in contempt of the first order.

Held, dismissing the application for leave with costs:

(1) It is well established law that a judge is functus officio once he has delivered his judgment and that he cannot vary his own judgment except under the slip rule or within one of the recognised exceptions. In the present case neither of these exceptions applies. As such the first order made by the judge who heard the interim injunction was effective. Since the first order was effective there was nothing to prevent a subsequent judge from hearing and disposing of the contempt proceedings against the applicants. Thus the order that the applicants were guilty of contempt was correctly made (see paras 20–21).

(2) The first order granting the interim injunction was clear and precise. Though the mandatory injunction was set aside by the judge who made it, the fact remained that his act was wrong ab initio and thus could not be sustained (see para 22).

[Bahasa Malaysia summary

Herman Ando ('plaintif') telah memulakan tindakan writ terhadap Tactland Development Sdn Bhd, syarikat pemaju perumahan ('defendan'), untuk kerosakan kepada rumahnya akibat daripada pembinaan dan kerja pembangunan yang dijalankan oleh defendan di tanah bersebelahan rumah plaintif. Plaintif kemudiannya memohon untuk injunksi interim menghalang defendan daripada menjalankan pembangunan selanjutnya di tanah bersebelahan dan meminta defendan memperbaiki rumah plaintif ('perintah

pertama'). Defendan memfailkan rayuan kepada Mahkamah Rayuan terhadap perintah ini ('rayuan pertama'). Apabila defendan gagal memenuhi aspek mandatori perintah tersebut iaitu untuk memperbaiki rumah plaintif, plaintif memfailkan permohonan terhadap pengarah-pengarah syarikat defendan ('pemohon-pemohon') untuk penghinaan. Sebelum permohonan untuk penghinaan didengar defendan memfailkan permohonan untuk mempersoalkan ('permohonan persoalan') sama ada aspek mandatori injunksi memang sebenarnya dibenarkan. Permohonan persoalan didengar oleh hakim yang sama yang menjelaskan bahawa dia telah memberikan perintah berhenti kerja tetapi beliau tidak mungkin memberi perintah mandatori kerana terdapat pertikaian terhadap apa yang menyebabkan kerosakan kepada premis plaintif ('perintah variasi'). Tidak puas hati terhadap perintah variasi ini, plaintif merayu kepada Mahkamah Rayuan ('rayuan kedua'). Di dalam prosiding penghinaan, kedua-dua pemohon didapati bersalah terhadap penghinaan dan diperintahkan untuk menjalani hukuman penjara tiga minggu dan denda sebanyak RM15,000 setiap seorang. Pemohon-pemohon memfailkan rayuan terhadap perintah ini ('rayuan ketiga'). Kemudiannya plaintif memfailkan permohonan untuk membatalkan perintah variasi ini tetapi permohonan ini ditolak atas alasan bahawa ia dibuat 30 hari selepas perintah variasi tersebut. Plaintif memfailkan rayuan terhadap keputusan tersebut ('rayuan keempat'). Atas persetujuan pihak-pihak, keempat-empat rayuan didengar bersama. Mahkamah Rayuan menolak rayuan pertama atas alasan bahawa tidak terdapat alasan untuk campur tangan dengan dapatan-dapatan di dalam perintah pertama memandangkan hakim perbicaraan telah mengguna pakai prinsip-prinsip undang-undang yang betul; membenarkan rayuan kedua atas alasan bahawa hakim perbicaraan tidak mempunyai kuasa untuk mengubah penghakiman apabila ia sudah direkodkan secara rasmi; menolak rayuan ketiga, yang mana adalah terhadap perintah penghinaan; atas alasan bahawa hakim perbicaraan telah secara betul memutuskan bahawa terdapat penghinaan oleh pemohon-pemohon; dan membenarkan rayuan keempat atas alasan bahawa aduan plaintif mempunyai merit. Ini adalah permohonan pemohon-pemohon untuk kebenaran merayu kepada Mahkamah Persekutuan di bawah s 96(a) Akta Mahkamah Kehakiman 1964. Ia adalah hujahan pemohon-pemohon bahawa perintah pertama, di mana perintah penghinaan didasarkan, salah dibuat dan kemudiannya diubah dan oleh itu pemohon-pemohon tidak menghina perintah pertama.

Diputuskan, menolak permohonan untuk keizinan dengan kos:

(1) Ia adalah undang-undang nyata bahawa hakim adalah functus officio apabila saja beliau memberikan penghakimannya dan bahawa dia tidak boleh mengubah penghakimannya sendiri kecuali di bawah 'slip rule' atau dalam salah satu daripada pengecualian yang ditetapkan. Dalam kes ini tidak satu pun daripada pengecualian-pengecualian ini diguna pakai. Oleh itu perintah pertama yang dibuat oleh hakim yang mendengar

injunksi interim adalah efektif. Memandangkan perintah pertama adalah efektif tidak terdapat apa-apa untuk menghalang hakim seterusnya daripada mendengar atau memutuskan prosiding penghinaan terhadap pemohon-pemohon. Oleh itu perintah bahawa pemohon-pemohon bersalah terhadap penghinaan adalah dibuat dengan betul (lihat perenggan 20–21).

(2) Perintah pertama yang membenarkan injunksi interim adalah jelas dan tepat. Walaupun injunksi mandatori diketepikan oleh hakim yang membuatnya, fakta kekal bahawa tindakan beliau adalah salah ab initio dan oleh itu tidak boleh dikekalkan (lihat perenggan 22).]

Notes

For cases on appeal to Federal Court, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 833–845.

For cases on interim injunction, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3425–3508.

For cases on judge generally, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4137–4168.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396, HL (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 96(a)

Rules of the High Court 1980 O 42 rr 5, 13

Appeal from: Civil Appeal No W-02–34 of 2007 (Court of Appeal, Putrajaya)

Sulaiman Abdullah (A Nedu Maran with him) (Nedu & Partners) for the appellant.

Ashokvijay J Sangharajka (Paari Perumal with him) (TK Wong Tan & Associates) for the respondent.

James Foong FCJ:

INTRODUCTION

[1] Enclosure 2(a) is an application by the applicants who were the directors of the defendant for leave to appeal to the Federal Court under s 96(a) of the Courts of Judicature Act 1964.

[2] To appreciate this application I shall commence by disclosing the facts of this case and in due course shall be referring to the parties in their original capacity in the court of first instance.

FACTS

[3] The plaintiff has instituted a writ action in the High Court against a housing development company ('the defendant') for damages caused to his house which was adjacent to the land where the defendant was constructing 26 units of double story terrace houses. Aside from the damages sought, the plaintiff also prayed for injunction to restrain the defendant from (a) carrying out further development on the adjacent land and; (b) requiring the defendant to forthwith carry out repairs to his house.

[4] Subsequently, the plaintiff applied and successfully obtained an interim injunction on the prayers sought. This order was granted by Justice Azmel. For ease of reference I shall refer to this order as the 'Justice Azmel's first order'. Justice Azmel's first order is both prohibitive and mandatory by nature.

[5] Dissatisfied with this order, the defendant filed an appeal to the Court of Appeal. This appeal carries the Court of Appeal registration No W-02–207 of 2004.

[6] Due to the failure of the defendant to comply with the mandatory order to repair the plaintiff's house, the plaintiff filed an application (encl 32) to commit the applicants (who were the directors of the defendant) for contempt. But before this application can be disposed by the court, the defendant filed an application to query whether the mandatory aspect of the injunction was indeed granted.

[7] This application to query Justice Azmel's first order was heard by the same judge who from his notes of evidence recorded:

> I am satisfied that I have the power to review my previous decision and to amend it if I am satisfied that the existing order is wrongly made. In respect of the order made by this court, I only made the stop work order. As to the mandatory order I could not have given it because the facts as to what caused the damage to the Plaintiffs premises were in dispute. As hearing to determine the cause of the cracks to the house has to be conducted first.

[8] Dissatisfied with this 'Justice Azmel's variation order', as I shall term this, the plaintiff filed an appeal to the Court of Appeal and it bears the Court of Appeal No W-02–1021 of 2004.

[9] Subsequently, Justice Azmel recused himself from hearing this case. Justice Malik Ishak took over and heard encl 32 (the contempt proceedings against the applicants). He found both the applicants guilty of contempt and ordered each to serve three weeks imprisonment and a fine of RM15,000 each, in default one month imprisonment. For ease of reference, I shall be referring to this order as 'Justice Malik's order'. The applicants filed an appeal against this decision with the Court of Appeal and it is registered as W-02–34 of 2007. In the meantime, the applicants paid the fine and obtained a stay on the custodial sentence.

[10] Some four years after Justice Azmel's variation order, the plaintiff filed an application (encl 163) to expunge Justice Azmel's variation order. This was heard by yet another judge, Judicial Commissioner Mohd Yazid Mustapha. This application was dismissed on the ground that the application fell short of O 42 r 13 of the Rules of the High Court in that this was made after 30 days from the date of Justice Azmel's variation order. I shall refer to this order made by the judicial commissioner as the 'Judicial Commissioner Yazid's order'.

[11] Dissatisfied with the Judicial Commissioner's Yazid's order, the plaintiff appealed to the Court of Appeal and it carries registration No W-02–1098 of 2008.

THE COURT OF APPEAL

[12] With the consent of parties, the four appeals listed above were heard together. The following are the decisions and summary of the grounds:

[13] For appeal No W-02–207 of 2004, which is an appeal by the defendant against the decision of Justice Azmel's first order, it was dismissed on the ground that the trial judge has applied the correct principles of law (*American Cyanamid Co v Ethicon Ltd* [1975] AC 396 and *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193) to the facts of the case and there is no reason to disturb the finding so made.

[14] For appeal No W-02–1021 of 2004 by the plaintiff against Justice Azmel's variation order, it was allowed on the ground that once the trial judge has pronounced his order he is functus officio and he (the judge) 'has no power to review, rehear, vary or set aside part of any judgment once it has been formally recorded'.

[15] In respect of appeal No W-02–034 of 2007 by the applicants against Justice Malik's order for contempt, it was dismissed on the ground that the trial judge has correctly arrived at a conclusion that there was contempt by the applicants since they: 'have had full knowledge of the intent and purpose of the

order of Azmel Maamor J but decided not to obey it. At the contempt proceedings they did not claim ignorance of the terms of the order on the ground of ambiguity. Neither did they raise the issue that the mandatory injunctive order had been side aside.'

[16] And for the last appeal W-02–1098 of 2008, which is an appeal by the plaintiff against Judicial Commissioner Yazid's order, it was allowed on the ground that there 'is merit on the plaintiff's complaint … The learned judicial commissioner should have approved the order agreed by the parties'.

QUESTIONS POSED

[17] In the applicants' written submission, four questions were proposed to the Federal Court:

9.1 Whether on the face of an admission by the High Court Judge of a mistake in the granting and/or sealing of a interlocutory mandatory order as in the instant proceedings, the correct test for the Court of Appeal hearing the appeal against the said interlocutory mandatory order ought to be confined to established principles enunciated in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 and/or *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293 or should it also include the consideration of the admission of mistake.

9.2 Whether the High Court Judge has the jurisdiction and/or power to hear and determine a formal application to review and/or set aside an order of the same High Court Judge if he is satisfied that the said order was wrongly made and did not reflect his true intention.

9.3 If the Honourable Court decides that the Learned High Court Judge had in fact the jurisdiction and/or power in circumstances mentioned in Question 9.2 above, whether it was competent for another High Court Judge to find the party affected by such order was in contempt of Court for failure to comply with such order.

9.4 Whether the High Court Judge hearing contempt proceedings for non-compliance of a court order, ought to have taken into his consideration that the said court order was wrongfully made.

9.5 If this Honourable Court decides on any one of the above questions in favour of the Applicants herein, ought not this Honourable Court set aside the orders of committal made by the Learned High Court Judge on 2–12–2006 and the order of the Court of Appeal on 16–7–2009'.

[18] Apart from these, the applicant's counsel during the hearing of this application before us added another question:

Whether a finding of guilt of contempt of court for non-compliance of an interlocutory mandatory order, which has penal consequences affecting a person's liberty, can be sustained in the instance where the terms of the said order are uncertain vague and ambiguous and where the mandatory order has been set aside subsequently by the same Judge who originally granted the Order.

ANALYSIS

[19] It is my view that this application should be dismissed for reason that it does not fulfil the provision of s 96(a) of the Courts of Judicature Act which says:

... an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court —

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be public advantage.

[20] It is a well established law that a judge is functus officio once he has delivered his judgment. A party who is dissatisfied with this judgment can appeal against it. The said judge cannot vary his own judgment except under the 'slip rule' (O 42 r 5 of the Rules of the High Court) or within the exceptions expressed in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393. In this case neither of these exceptions applies.

[21] Since Justice Azmel's first order is effective, there is nothing to prohibit a subsequent judge to hear and dispose of the contempt proceedings against the applicants. Thus, Justice Malik's order stands correctly made.

[22] I do not agree that Justice Azmel's first order is 'uncertain, vague and ambiguous' as described in the additional question posed. To me, it is clear and precise: 'satu injunksi di mana defendan diperintahkan dengan serta-merta untuk memperbaiki segala kerosakan atau keretakan di rumah plaintif yang telah diakibatkan oleh kerja-kerja pembinaan di tapak binaan tersebut.' Though the mandatory injunction was set aside by the judge who made it, the fact remains that his act is wrong ab initio and thus cannot be sustained.

[23] Since legal principles for the granting or refusal of an interim injunction are well established and fully discussed and applied by the courts below, I am of the opinion that there is no new question of law nor is there any question of

public importance to regurgitate it.

CONCLUSION

[24] Accordingly, this application for leave to appeal to the Federal Court is dismissed with costs.

[25] My learned brother judge, Alauddin Dato Mohd Sheriff, and sister judge, Heliliah Mohd Yusof, have read this judgment in draft and associate themselves with the contents.

Reported by Kohila Nesan